IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 134 of 1983

For Approval and Signature:

Hon'ble MR.JUSTICE N.J.PANDYA and

Hon'ble MR.JUSTICE S.D.PANDIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements? yes.

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2. To be referred to the Reporter or not? yes.

3. Whether Their Lordships wish to see the fair copy of the judgement? No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No.

5. Whether it is to be circulated to the Civil Judge? No

COMMISSIONER OF INCOME-TAX

Versus

RAMDAS N DESAI

Appearance:

MR MANISH R BHATT for Petitioner

MR JP SHAH for Respondent No. 1

CORAM : MR.JUSTICE N.J.PANDYA and

MR.JUSTICE S.D.PANDIT

Date of decision: 06/09/96

ORAL JUDGEMENT (Per:Pandit.J)

The Income-tax Appellate Tribunal, Ahmedabad

Bench-A, Ahmedabad had referred the following question of law for the opinion of this court.

" Whether on the facts and in the circumstances of the case, the Income-tax Appellate Tribunal was right in law in holding that the Income-tax officer did not receive any factual information from the auditor which he did not have and that therefore, the action under section 147(b) was unjustified ? "

2. The assessee initially was assessed for the year 1967-68 by the Income-tax Officer and at that time an amount of Rs. 1,60,000/- which was received by the assessee was not considered as liable to capital gains and assessment order was accordingly passed by the Income-tax Officer. Thereafter, Senior Auditor informed the ITO on or about 6.8.69 that the capital gains of Rs. 1,36,635/had escaped the assessment resulted in short levy of tax of the amount of Rs. 20,495/- and at the same time he desired that ITO to examine and take necessary action in the matter. Thereafter the ITO took action u/s 147(b) and he passed an order that capital gains of Rs. 13,635/ had escaped the assessment and he accordingly passed an order against the assessee. The assessee preferred an appeal before the CIT(Appeals) and the CIT by his order dated 6.9.78 rejected the appeal of the assessee and therefore, the assessee preferred an appeal before the Income-tax Appellate Tribunal, Ahmedabad and the said appeal was heard by the Tribunal and by its order dated 18.9.79 the Tribunal came to the conclusion that the Income-tax Officer did not receive any factual information and that the action u/s 147(b) of the I.T.Act was not justified and thus allowed the appeal. The Tribunal has made the reference to this Court at the instance of the revenue.

3. There is no dispute of the fact that present assessee and 2 other partners were assessed by the ITO earlier and had passed an order on 13.11.67. At the time of the said assessment, present assessee as well as his two other partners were represented by one and the same advocate and a joint V.P. was filed in that case. The history of the amount in question was also brought to the notice of the ITO at the time of earlier assessment. Now these facts are not at all in dispute. It is very pertinent to note that ITO in his order dated 19.2.70 has no where mentioned that while passing the earlier assessment order any mistake was committed by him in application of law to the facts or that important question was lost site by him due to inadvertence or

mistake. It is very pertinent to note that a contention was raised on behalf of the assessee that the amount in question could not be treated as capital gain. There is no discussion by the ITO on the said contention.

4. The CIT in his order dated 2.9.78 has mentioned in his order dated 2.9.78 has mentioned in para 5 as under:

> "The appellant had filed details of the transfer of property along with the return of the income. The Income-tax Officer had by chance failed to consider the taxability of the surplus in the assessment."

Thus in the order the CIT has also recorded a finding of fact that the assessee had filed all the details of the property in question. It is also pertinent to note that thus in the appeal the CIT did not allow the advocate for the assessee to argue on merits about the taxability of the profits alleged to have been received by the appellant

5. Thus the order of the ITO as well as the order of the first Appellate Authority do not disclose that there was any misapplication of law by the ITO while passing his assessment order or that there was any misapplication of mind or there was any losing of site of the fact as regards the item in question. It is no where claimed by the revenue department that there was a mistake of application of law and on account of the information supplied by the auditor, the ITO realised this mistake and because of the releasing of the mistake in misapplication of law and in ignoring the income of the assessee he has exercised his power u/s 147(b) of [the I.T.Act.

6. On behalf of the revenue the case of R.K.Malhotra vs. Kasturbhai Lalbhai 109 ITR 537 and CIT 189 ITR 285 were cited before us. It is true that in the case of R.K.Malhotra vs. Kasturbhai Lalbhai (Supra) the Apex Court has held that the information received from the audit department could also be treated as a ground for exercising the powers u/s 147(b) but in the subsequent case of Indian and Eastern Newspaper Society vs CIT 119 ITR 996 the Supreme Court has considered its earlier decision in Malhotra's case(supra) and laid down the following principles:

> " That the opinion of the audit party on a point

of law could not be regarded as "information" enabling the ITO to initiate reassessment proceed-ings under s.147(b). The ITO had, when he made the original assessment, considered the provisions of ss.9 and 10 of the Indian I.T.Act 1922. Any different view taken by him afterwards on the application of those provisions would amount to a change of opinion on material already considered by him.

The proposition of the decision of the Supreme Court in the case of Kalyanji Mavji and Co. [1976} 102 ITR 287, to the effect that a case where income had escaped assessment due to "oversight, inadvertence or mistake' of the ITO must fall within s. 34(1)(b) of the Indian I.T. Act 1922, is stated too widely and travels farther than the statue warrants in so far as it can be said to lay down that if, on reappraising the material considered by him during the original assessment, the ITO discovers that he has committed an error in consequence of which income has escaped assessment, it is open to him to reopen the assessment. An error discovered on is reconsideration of the same material(and no more) does not give him that power."

The principles laid down in the case of Indian Express Newspaper Society (supra) are again confirmed by the Apex Court in 189 ITR 285 in the case of A.L.A Firm vs. CIT That would be quite clear from the following observations in the said case.

"Proposition (4) in Kalyanji Mavji's case [1976} 102 ITR 287 (SC) refers to a case where the Income-tax Officer initiates reassessment proceedings in the light of "information" obtained by him by an investigation into a material already on record or by research into a law applicable thereto which has brought out an angle or aspect that had been missed earlier. Proposition (2) no doubt covers this situation also but it is so widely expressed as to include also cases in which the Income-tax Officer having considered all the facts and law, arrives at a particular conclusion, but reinstates proceedings because, on a reappraisal of the same material which had been considered earlier and in the light of the same legal aspects to which his

> attention had been drawn earlier, he comes to a conclusion that an item of income which he had earlier consciously left out from the earlier assessment should have been brought to tax. In other words, as pointed out in Indian and Eastern newspaper Society's case (1979) 119 ITR 996 (SC), it also ropes in cases of a "bare or mere change of opinion" where the Income-tax Officer(very often a successor officer)attempts to reopen the assessment because the opinion formed earlier by himself(or, more often, by a predecessor Income-tax Officer) was, in his opinion, incorrect. Judicial decisions have consistently held that this could not be done and Indian and Eastern Newspaper Society's case [1979] 119 ITR 996(SC), has warned that this line of cases cannot be taken to have been overruled by Kalyanji Mavji [1976] 102ITR (SC).

Therefore, if the principles laid down by the Apex Court in the above said case are taken into consideration along with the facts of the present case, then it would be quite clear that the view taken by the Income-tax Appellate Tribunal is the correct view in the matter. At the cost of repetition it must be stated that the fact that all the materials were placed by the assessee before the ITO when he passed the final order by assessing the income tax liability of the assessee and the ITO does not mention in his order as to why he was exercising power under section 147(b). He has not recorded a finding of fact that there was any mis application of law by him or that there was mistake on his part in his ignoring the item in question. Therefore, in the circumstances there was no ground for him to exercise the power u/s 147(b) of the I.T.Act. It seems that as the audit department has informed him that capital gain amounting to Rs. 1,36,635/- was left out of consideration by him in the earlier year. he has proceeded to take action u/s. 147(b) I.T.Act which is not justified as discussed above.

7. Therefore, in view of the above consideration we are of the opinion that the question referred to us will have to be answered in the affirmative and against the revenue. We accordingly direct the parties to bear their respective costs.

(N.J.Pandya.J)

(S.D.Pandit.J)